

# Zoning Board of Appeals – Town of Spencer



## *Minutes*

Regular Zoning Board Meeting  
Wednesday, June 22, 2011 7:15 PM  
McCourt Social Hall  
Memorial Town Hall

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The meeting was called to order at 7:15 p.m.

Zoning Board Members Present: Chair Pamela Crawford, Clerk Joanne Backus, Allan Collette, and Delores Kresco, alternate.

Zoning Board Member Absent: None.

Staff present: Stanley Weinberg, Town Counsel, Michelle Buck, Town Planner, Bea Meechan, Senior Clerk, ODIS.

### **New Business:**

**A. Public Hearing - Jonathan Gabriel, Trustee of the ATV Realty Trust, 51 Borkum Road.** Ms. Crawford opened the hearing at 7:20 p.m. The Clerk read the brief as follows: “On remand of the Commonwealth of Massachusetts, Worcester Housing Court, for a determination as to whether, and to what extent if at all, non-business related ATV/dirt bike activities are permissible at 51 Borkum Road, Spencer (Assessor’s Map R05/1). The property is owned by Jonathan Gabriel, Trustee of ATV Realty Trust. [On December 7, 2006 the Spencer Zoning Board of Appeals denied an appeal of Mr. Gabriel of the Building Inspector’s Cease and Desist encompasses all ATV and/or dirt bike activities]. For the purpose of the this remand, the Cease and Desist issued by the then Spencer Inspector on October 3, 2006, encompasses all ATV/dirt bike activities, business related as well as personal and private.”

Ms. Crawford announced members sitting in the voting are Allan Collette, Joanne Backus, and Delores Kresco.

Mr. Gabriel and his attorney, Mr. Morris Bergman, were here tonight. Ms. Crawford asked for a presentation on the case at this time.

Mr. Bergman said on the behalf of his client, Mr. Gabriel, he was here tonight to contest/dispute the Cease and Desist Order issued by Mr. Morra *to stop private use of* ATV and/or dirt bike activities *at the private property* – 51 Borkum Road. Mr. Bateman distributed packets of documents, retrieved from the ZBA’s file at Spencer Office of Development & Inspectional Service, to the Board. Mr. Bateman said the case file contained several memos (dated in 2006) back and forth between Ms. Karen Cullen and Mr. Robert Morra, (the then Town Planner and the Building Inspector & Zoning Enforcement Office), and also letters from Ms. Cullen to various residents of Borkum Road.

Mr. Bergman's arguments are: 1) based on the memos found throughout the file they were generally consistent with an indication that the Bylaws do not prohibit such private use (in this case ATV/dirt bike activity) on private property - this he interpreted that the Town would not enforce the Bylaw ordinance – a denial or refusal to act on the matter; and 2) Ms. Cullen sent the letters to the residents (letters dated 4/13/06), and under the MGL, chapter 40A, the residents and abutters have an obligation to appeal within the appeal period time allowed; however, no one had filed for an appeal. To support the argument, Mr. Bergman introduced the following exhibits at this time:

**Exhibit 1:**

Letter from Ms. Cullen to the residents of Borkum Road, dated 4/13/06, paragraph 3 read “Unlike an event open to the public, or conducted for profit, which requires notification, a public hearing before and a Special Permit from the Zoning Board of Appeals (ZBA), this appears to be a private use of private property. It can be compared to someone holding a July 4<sup>th</sup> party for a dozen or so of their friends, albeit off-road vehicles can be a touch noisy to some. *Under current by-laws, the Town has no authority to regulate such event.*”

E-mail from Ms. Cullen to ‘share65’, dated 5/26/06, paragraph 1 read “Spencer cannot stop the whole idea because *we do not prohibit the activity in our zoning bylaw* – the Spencer’s zoning back in the mid-1960’s. My guess is that it was not an issue in the mid-1980’s when the zoning bylaw was rewritten. Although not specifically prohibited in the draft bylaw we have out at this time, I suspect we will add that or something to address these uses before the town votes on the bylaw at the town meeting. If you or anyone else out there knows of specific language used and other town bylaws, I would certainly appreciate a copy of that language.”

Comment: Mr. Bergman said the above documents contained very strong wordings (*referencing to the italicized context*), which clearly indicated that the Town could not enforce the Bylaw on Mr. Gabriel.

**Exhibit 2:** MGL, Chapter 40A., Sec 7 & 8 - the procedural appeal process explaining of what shall be done when receiving the denial letter, or letter indicates that the Enforcement Official will not reinforce the bylaw ordinance.

Comment: Mr. Bergman said the letter (dated 4/13/06) sent to the residents clearly falls under the above MGL. The letters did not disclose the right to an appeal, which was unbeknown to the residents that they have such right, thus, there were no appeal filed.

Note: Mr. Bergman believed there was nothing misleading about the intent of the letters.

**Exhibits 3, 4 and 5 are composed of the following:**

- 1) A notification letter (dated 4/19/06) from the residents; the Bell, informed Ms. Cullen of the ATV activities at 51 Borkum Road.
- 2) A hand-written note instructed writing a letter to “thank” the residents on the notification.

3) A letter from Ms. Cullen to the residents dated 4/20/06, thanking the residents, the Bells, for such notification.

Comment: Mr. Bergman suspected the note was written by Mr. Morra instructing Ms. Cullen to response back to the Bells. Mr. Bergman assumed that together, Mr. Morra and Ms. Cullen, made the determination to whether the proposed use at 51 Borkum Road was in violation to the zoning ordinance.

4) A letter (dated 4/28/06) from Ms. Cullen to Mr. Gabriel. Mr. Bergman called attention to the second paragraph which read: *On April 13<sup>th</sup>, this office sent area residents a letter, based upon your representation that the event posted on the internet was not open to the public and was not part of any business activity, telling them that your proposed use of the property for ATV use was legal and was not regulated by Spencer's Zoning Bylaw.* Since that time we have found evidence that in fact, it is either part of a business enterprise or it is a private club, either of which requires a special permit from the Zoning Board of Appeals. Enclosed is a letter to that effect from the Building Inspector/Zoning Enforcement Officer.

5) The letter (dated 4/28/06) from Mr. Morra to Mr. Gabriel. The second paragraph read "Several web sites have two events scheduled for August in Spencer that are sponsored by Gabriel Racing. In my opinion, and based on the information I have at this time, I feel this activity is related to the operation of your Business located in Northborough, Ma and is not a by-right use of the land in a residential zoning district therefore requires a special permit from the ZBA in accordance with SECTION 5.4, A15 of the Spencer Zoning Bylaw", and the third paragraph read "If you believe and can demonstrate that you are conducting this event as a private or nonprofit membership club, as you previously implied, a special permit would also be necessary in accordance with SECTION 5.4, A12.

Comment: Mr. Bergman summarized, the letter (item 4), that Ms. Cullen addressed a concern that ATV activity use may be excessive and also an additional concern over the wetland area; however, Ms. Cullen did believe the private use was to be lawful as stated clearly in the letter. Mr. Bergman also pointed out that *Section 5.4, A (Residential Uses) item 15 does not exist* in the 1985 Spencer Zoning Bylaw which currently was used at the time. Furthermore there was a discrepancy made, Section 5.4, **A12** should have been Section 5.4, **B12** (Institutional, Recreational and Education Uses for private, nonprofit membership club or lodge).

Mr. Bergman explained the next document, the letter of **Cease and Desist Order** (CDO) dated 10/6/06 issued by Mr. Morra to Mr. Gabriel, which was originally appealed with the Spencer ZBA, and it is the document in question on the remand from the Worcester Housing Court. Mr. Bateman said it is the most important document - especially the content of the first paragraph which read as follows:

"In a previous letter to you dated April 28, 2006 I expressed my concern with the use of the vacant property known as 51 Borkum Road as a track for use by ATVs and/or dirt bikes. In that letter you were also advised to seek approval of the ZBA for a special

permit **for anything but personal and private use of the track**. Since that time you have chosen not to go before the board for a special permit but have continued to use the track.”

Mr. Bergman said all documents (back and forth between Ms. Cullen and Mr. Morra), and with the above COD letter have demonstrated with consistency that “anything but personal and private use of the track at a private property on 51 Borkum road is prohibited.” Mr. Bergman agreed the personal and private use of the track is allowed in this case.

The ZBA denied Mr. Gabriel’s appeal of the Building Inspector’s of Cease and Desist Order (CDO) in December 2006. The ZBA’s decision, signed by 3 members, was to upholding the Building Inspector’s CDO. The Board indicated its reason on the Certificate of Decision that:

*“In reference to the racing track as a practice facility was out of realm of a family outing kind of the place based on their advertisement.”*

Mr. Bergman said his interpretation for the reason rendered by the Board is that: 1) the ZBA uphold Mr. Morra’s determination the property cannot be used as a practice facility in the advertised manner; and 2) that a family outing is permissible. Mr. Bergman does not think the interpretation is misleading, nor, altered what the original reason has intended. In fact Mr. Bergman thought the entire interpretation is in consistence with everything he has demonstrated – which that the people who were involved in the case repeatedly indicated the private use is not prohibited by the zoning bylaw, and will not reinforce the CDO on Mr. Gabriel if he only uses it for private and a personal use.

Based on the documents gathered throughout, Mr. Bergman at this point concluded that Mr. Morra, Ms. Cullen (the Authority Officials under the Statue), and also the residents/abutters, had determined that Mr. Gabriel can only use 51 Borkum Road as a personal and a private use. In addition, Mr. Morra and Ms. Cullen consistently in their decision making stated that the private use is allowed by the zoning bylaw.

Mr. Bergman noted based on a document from Ms. Cullen to one of the parties indicating there would be a new zoning ordinance and this new (2006) Zoning Bylaw may include prohibiting of the motorized sports - specifically preventing the current situation from occurring in the future. However, under Section 4.2.E item 22 read “**Outdoor sports facility** for non-motorized sports such as a golf course, country club, tennis **is allowed by a special permit** for RR, SR, LR, and C zoning districts” which Mr. Bergman said contradicted with what Ms. Cullen said in the letter to all residents. The motorized sports should have been exempted if the Town wanted to prohibit Mr. Gabriel from operating under any sort. There was an opportunity to eliminate the use for motorized sports by indicating that such use is prohibited *by* the Zoning Bylaw, but the new Zoning Bylaw stated otherwise – allowing the use by obtaining a special permit. Also noted, the 2006 Zoning Bylaw was adopted by the Town a few weeks after an issuance of CDO by Mr. Morra.

Mr. Bergman explained the property in question contains approximately 65 acres of land. Mr. Gabriel used it as private use (for ATV/dirt bike) since 2002 which was 4 years before the ATV activity became an issue. There also have been a number of tracks existing throughout Spencer, see the list under Exhibit 7. Mr. Gabriel believed that numerous properties in which the ATV tracks have been allowed to use are in the RR zoning district.

Mr. Bergman and Mr. Gabriel simply believed the intent of the CDO specifically was not to prohibit Mr. Gabriel from using the property for a private and personal use. With this being said Mr. Bergman respectfully asked the Board to consider Mr. Morra's decision making, as the Zoning Enforcement Officer, which indicated that there is no violation to the zoning ordinance if Mr. Gabriel were to only use his property for personal and private use.

Note: There were several people who are abutting to 51 Borkum Road presented this public hearing.

Mr. Bergman ended his presentation with the note that a lot of abutting neighbors are here and he believed it was to intimidate Mr. Gabriel. He just wanted to caution that tonight is a hearing to appeal the decision of Zoning Enforcement Officer, not an appeal on a special permit or a variance situation where the effects on the neighborhood are necessary for the legal point of view which is relevant to the granting of the decision on a special permit and a variance application.

Mr. Bergman urged the Board to end the matter tonight, not to send it to further litigation, and if the Board could modify, or do what it is legally allowed, and to make this decision applicable only to the commercial use, which would be to allow Mr. Gabriel to continue for private and principal use. Mr. Bergman then thanked the Board for an opportunity to make the presentation.

Mr. Weinberg, Town Counsel, would like to make it clear about the documents that are submitted and will be submitted; the documents (exhibits) are follows:

1. The packet of information submitted by Mr. Bergman.
2. The "Agreement for Judgement for Remand to the Spencer Zoning Board of Appeals" from the Worcester Housing Court by which the case was remanded back to the ZBA.
3. Two maps based on aerial photographs prepared by Ms. Buck, Town Planner. They are identical maps, except that one contains labels identifying the abutters' names and property addresses, the other does not.
4. Photograph of site [an arial photograph displaying track on the property]
5. Plan of Proposed Practice Track, DEP file #293-623 prepared by Guerard Survey & Co., Associate Inc., in Westborough, Ma, on the ATV Realty Trust, Mr. Jonathan Gabriel, Trustee, dated 8/4/2006
6. News article regarding the practice track on website atvriders.com, referencing to Garbriel Racing and ATV Test Ride.

Mr. Weinberg asked Mr. Gabriel to verify the photograph of the property, and if in fact it is the property he owned and identified as 51 Borkum Road. Mr. Gabriel answered yes; the property is 51 Borkum Road. Mr. Weinberg said all documents are now part of the Town's record.

Chair Crawford asked for comments and questions from the Board members at this time.

Mr. Collette said there were no buildings on that property, is this correct?

Mr. Bergman said there was not any documentation on any of the decisions that said or has anything to do with the concept of accessory use.

[Note: Accessory use or building is defined in the zoning bylaw as a use or building which is subordinate and customarily incidental to the principal use or building and is located on the same lot as the principal use or building.]

Mr. Collette asked what Mr. Bergman considered as the primary use of the property in this case?

Mr. Bergman said some towns classified this use as a passive use, he referenced to Exhibit 8; Sturbridge Zoning Bylaw 2010, which recognizes hiking, fishing, woods-snowmobiling as passive use. In this case, considering the noises of the ATV, the passive use is the recreation.

The fact that the track is there prompted Mr. Collette to ask if Mr. Gabriel is not concerned the tracks would be kept in that residential property and may create an issue.

Mr. Bergman addressed if Mr. Morra, the Building Inspector/Zoning Enforcement Officer, did not see the track as being an issue there, he himself does not see that either. All documents presented indicate there have not been any indications that because of the track there it would prohibit Mr. Gabriel from private use.

Mr. Collette commented it had appeared that Mr. Bergman thinks this particular property does not need any primary use.

Mr. Bergman responded this is not a question of accessory use; it is a question of whether or not the private use of private property is prohibited by the zoning ordinance. The track is irrelevant; no one has opened the track up for profit or for the public. In fact Mr. Morra's decision determined that the private use is lawful, Mr. Bergman argued as to how could anyone even contest that.

Mr. Collette: How would the Board suppose to make that distinction – private use versus commercial use?

The Board can modify the remand from the Worcester Housing Court; and modify the Certificate of Decision issued on 12/7/06. If the Board wishes to resolve the issue tonight, the language which can be used in the Decision such as "The reference to the racing track in a practicing facility in any other commercial use of the property is prohibited, property can be used as a

private purpose.” Under the circumstances, this is all Mr. Bateman could come up with, if he had more time with Mr. Weinberg he is certain they would produce a better context.

As for making a distinction from commercial use to residential use, the Board can put limitations/restrictions on the use to Mr. Gabriel’s family, e.g. limit number of hours, days, and the number of people. Mr. Bergman contacted Mr. Weinberg previously for the possibility of an agreement limiting the use that would be satisfactory to everyone involved - the Town, Mr. Gabriel and the residents of Borkum Road. He and Mr. Gabriel are willing to participate in such an agreement.

When Mr. Gabriel came to the ZBA in 2006, he had inferred the use was for a practicing track. Ms. Backus inquired as to the purpose of the practicing, specifically for what?

Mr. Bergman said the practicing is a hobby, and would assume for better skills on ATV’s.

Ms. Backus said she would assume that may be Mr. Gabriel is practicing for some sort of an event.

Mr. Bergman: Even if Mr. Gabriel practices for an event, as long as the event is not being held at the property, Mr. Gabriel shall be able to practice on the ATV.

Ms. Backus: If a professional team practices, they are generally practicing on the property owned by the team for a business purpose. She could not see where if Mr. Gabriel practices the ATV on the private property it is separated from a business practice. Mr. Backus noted that the nuisance value is higher when practicing for a business purpose as opposed to the private use. Ms. Backus believed Mr. Gabriel has an ATV racing business with his sons. She asked whether his sons will use the property for practicing as well.

At this time Mr. Gabriel asked to be heard by the Board; the Board allowed this. He said his sons do not race anymore; they do repair work on snowmobiles, dirt-bikes, and motorcycles. The word “track” or “practice track” has been used because the property has tracks on it for racers since the 1950 - 1960’s. If he is going there to practice, it is actually going for riding – dirt bikes, and snowmobile in the winter, which we like to do for enjoyment.

Mr. Collette once again asked what primary use of the property is, because as of now it sounded like track use (as a primary purpose use).

Mr. Bergman said the property has not been used for anything specifically. Mr. Gabriel said in the past few years he and his family did do hunting and shooting on the property for his own personal use. There was a point Mr. Gabriel had a discussion with Mr. Weinberg, and had been told not to do any riding activities due to an ongoing court process, and Mr. Gabriel respected that. Mr. Gabriel is here tonight to express to the Board that he would like to use the property, to ride on it for personal use.

Mr. Collette made a comment that there is still no residential use.

Mr. Bergman said the issue here is whether or not it is pertinent to accessory use, there is no dwelling on the property. There was a truck trailer, but it had been taken down some time ago. Mr. Gabriel has not even lived in the property, he is also not representing that he lives on the property. In addition, the accessory use component has never been mentioned in any documents produced by Mr. Morra and Ms. Cullen, except the question whether the private aspect of this use was allowed by the zoning bylaw. Mr. Bergman does not dispute the commercial aspect use by Mr. Morra which is consistently indicated on his documents and that the use of the property (on 51 Borkum Road) could not be used for commercial purposes.

Mr. Bergman stated the determination that private use of private property was allowed under the zoning ordinance found throughout the above documents written by Ms. Cullen, Town Planner and Mr. Morra, Spencer Inspector of Building and Zoning Enforcement Officer. Mr. Bergman asked the Board to render its decision to recognize that - whether or not there was or was not a factual legal basis to uphold Mr. Morra's decision.

Mr. Bergman stated the Board can put the end to a lot of the acrimony existing between the parties and come to a decision that specifies what Mr. Gabriel can or cannot do in regards to his personal and private use at his property.

With no further comments and questions from the Board, Chair Crawford opened the hearing to the public at this time.

Mr. Michael Lussier of 2 Buteau Road addressed the following to Mr. Bateman's comments:

- The property had been used a few times in the past year [Mr. Bateman said there had not been any use on the property for the past 4 years].
- Mr. Bergman stated that the track had been used since 2002 prior to the ATV activities becoming an issue. That is incorrect. The track was actually built during the cleanup process of the property by Mr. Gabriel. [There is a document in the ConCom's file at ODIS, Spencer Town Hall].

Mr. Lussier said the use – riding dirt bikes or motorcycles was not a regular ordinary personal use in the backyard. It is clearly a race track, and he does not know anyone else in Spencer that has a track like this for private and personal use.

Ms. Christine Mancini of 55 Borkum Road said she has been residing there since 1985 and the property is very close to 51 Borkum Road. Ms. Mancini expressed the following:

- When there was ATV riding; she had to close down the windows, and could not sit in the backyard at all due to the heavy vibration on the ground created by the ATV's engine mechanism.
- In regards to the shooting practice at the site, Ms. Mancini is concerned about safety, especially since her backyard is abutting 51 Borkum Road - People could accidentally get hurt from the bullets.



Ms. Mancini also gave an account of how the use had become the issue: The whole situation, related to the disputing of the use – private versus commercial use, got ignited when Ms. Mancini's family member [who was friends with Mr. Gabriel's associate] learned about the racing event being held at a party July 4<sup>th</sup> (2006) which was fully advertised on an internet web site. Ms. Mancini concluded that the track is not intended for private and personal use, its purpose is for business and profit. The area is rural and scenic and should remain that way.

Mr. Seth Cook of 1 Clark Road said he has noticed on numerous occasions there have been trucks loaded with dirt bikes that go on to the site. He was not certain whether riding activity occurred or not. However, he has a concern on the excessive speeding of the trucks traveling up and down on the road. [On July 4, 2006, Mr. Cook almost got run over by a truck/vehicle from the site while he was walking his dog. There was an investigation done by the Spencer Police, and the record is on file at the Police Station].

Mr. Andrew Cadrin of 79 Borkum Road said the argument that is given by Mr. Bergman and Mr. Gabriel stated the use is for private and personal use - however the vehicles (e.g. trucks, trailer, and dirt bikes) have commercial license plates registered to Mr. Gabriel's business establishment. Mr. Gabriel said that to distinguish the use for this property whether it is commercial or private use is impossible. Private use could be Mr. Gabriel, his sons, cousins and friends. With commercial activity it is generally more than one person. Borkum Road is steep and narrow, it is also a private road and commercial vehicles by nature are very wide in size. Mr. Cadrin is concerned where a school bus and a commercial vehicle are traveling on the opposite direction passing each other at the same time on the road – this is a dangerous situation.

Mr. Michael Griffin of 33 Borkum Road said his property is located on the top of the road, not abutting to 51 Borkum Road. When Mr. Gabriel visits the site and brings all his stuff - e.g. dirt bikes, equipments, etc., usually on weekends, these activities generate loud noises which interfere and interrupt him from enjoying the use of his private use and personal property.

Mr. Jim St. Germain of 2.5 Buteau Road said his property is directly abutting the site in question. Mr. St. Germain's property is very close to part of the racing track. He expressed his concerns as follows:

- The snowmobile activities at the site differ from a normal private use as opposed to the rest of the neighbors. The operators/riders kept going around in circles, and around continuously for a long lengths of time. They also have altered the exhaust system to get additional horse power while riding on the snowmobiles.
- The racing track has a negative impact to the value of his property, and the surrounding properties as well.
- The definition of a private and personal use means for a single individual, for you yourself; it does not allow for family member(s) and extended family, otherwise the use will fall under commercial use.
- Mr. St. Germain had chosen this property, 2.5 Buteau Road, purposely for its tranquility, calm and quiet setting. Now he cannot enjoy sitting in the backyard due to the extremely aggravated and unwanted noise from the activities. Restrictions on the use with limited

numbers of days per week does not matter, the noise would become an everyday nuisance and destructive to his life and the lives of the others (in the neighborhood).

Mr. St. Germain asked the Board to take the above concerns under consideration and that the residents of the Town who pay taxes here versus the individuals who live outside of town and may bring their disturbance here to town.

Ms. Crawford asked if the vehicles used in the riding are modified vehicles.

Mr. Gabriel replied the vehicles used at the time were modified vehicles, but they are not at the present time.

Ms. Backus inquired as to the last time Mr. Gabriel, his sons, or anyone with Mr. Gabriel's permission were at the site.

Mr. Gabriel said his sons were there approximately a year and a half ago with no involvement with dirt bikes, just a 4-wheel vehicle. They stayed for about an hour and a half. Mr. Gabriel had not given anyone permission to use the property for any purpose. However, he has no control over people who trespass or kids who ride dirt bikes on the property. If he was to see that he would notify the Police or chase them out from the property.

Mr. Weinberg said based on the advertisement it indicates the ATV's used were modified high performance machines. What kind of ATVs are being used now? In addition, could the exhaust pipes be adjusted as a means to modify the noise levels – lower and higher?

Mr. Gabriel responded the modified high performance ATVs were used in the race. Mr. Gabriel's son does not race anymore. ATVs being used currently are stock 400 and 450. The exhaust pipes are modifiable, and can adjust to a lower or higher level.

Mr. Weinberg referenced the article on the 450 ATV Test Ride that had appeared on the website address was atvrider.com, on 11/4/09, which read "Recently, ATV rider.com was invited to a private practice track to throw a leg over the 2009 Gas Gas 450 Wild." Mr. Weinberg asked if the track the article referred to is the track at 51 Borkum Road. [The article will now be part of the Town's record].

Mr. Gabriel said the site referenced in the article is 51 Borkum Road.

The property at 51 Borkum contains wetlands; in addition, it is a private property. Mr. Cook asked the Board that prior to the track being built at the site, would that require an approval from the Board, Conservation Commission (ConCom), and the Town?

Mr. Weinberg explained there was ConCom proceeding relevant to the grading and erosion control which had nothing to do with the track and ATV riding.

Mr. Gabriel responded that the property was a junkyard and he spent a good amount of money on cleanup and the removal of material (e.g. tires, truck, etc.) at the site. There was an existing

road/track there was part of the junkyard. If you look at the old photographs where the junkyard was and where the track is at present time, the track is at the exact same location as the [previous] junkyard. Mr. Gabriel said in the process of cleaning up and removing junk, we had made trails – that was what we wanted to do. Cleaning up the site was part of being in compliance with the DEP, ConCom, and the Town of Spencer as well. The equipment and the riding of vehicles (ATVs) were there to assist transporting the junk so we had ridden on them since then – and this is how the ATV riding had started at 51 Borkum Road.

Ms. Pamela Simones of 64 Borkum Road said she has been living as a resident since 1990's and she has horses, which she has ridden along Borkum Road. The following were complaints and concerns from Ms. Simones:

- The noises generated by the ATVs were unbearable and very annoying which you could not imagine unless you were there.
- The track was not there originally, it was dug up and was constructed by Mr. Gabriel.
- Any time there was a gathering at Mr. Gabriel's property, Ms. Simones could not horse ride without taking her own life in jeopardy because of the excessive speed of the vehicles - ATVs on the road operated by people that participated in the gathering.
- She objected to any 4-wheeler being used on 51 Borkum Road, as air pollution and noise nuisance to the wilderness were significant concerns.

Ms. Mancini said there is a report being kept at the Police Department documenting that there were people at 51 Borkum Road less than a year and a half ago, which is in contradiction with what Mr. Gabriel had answered earlier. Whether or not they are Mr. Gabriel's associates, she does not know. Ms. Mancini asked if reducing the ATV's engine power, would Mr. Gabriel be capable of adjusting and modifying the noise levels as mentioned above - including adjusting the RPM also. Due to the complicated mechanism working order of RPM's, Ms. Mancini does not believe the modifications are possible.

Ms. Mancini agreed with Ms. Simones in terms of the wilderness. Ms. Mancini has begun noticing that the wildlife (e.g. deer, wild rabbits and wild turkeys, etc) which had disappeared are now returning back to her yard since the ATVs activity stopped in 2006. It would be shameful to have the wildlife disappear again just for Mr. Gabriel's pleasure while the neighbors would have lost significant pleasure from the natural activity. Ms. Mancini suggested donating this property to the Town as conservation land.

Mr. Shawn Philbrick of 18 High Street said the power on the 4-wheeler can be modified to produce a lower noise. His friends practice riding in that part of town for long hours without any complaints. When he got permission from Mr. Gabriel to use the property, people would call the Police if he practiced there. He tried to be respectful and do any riding activity between 11:00 am to 4:00 pm. and still Police were notified. Mr. Philbrick made the following comments:

- He would like to have a safe place to do what he enjoy (ATV riding), just like the neighbor who enjoys horse-back riding.

- Mr. Philbrick made a clarification that the person who almost ran Mr. Clark and his dog over on July 4, 2006 in fact was not anyone from Mr. Gabriel's party. [The person lives in the neighborhood of Borkum Road].
- Mr. Philbrick has used other tracks in Town where senior citizens are residing nearby or abutting to the track, and there have not been any complaints.
- Mr. Philbrick's conclusion was that no matter what accommodations Mr. Gabriel tried to make (whether limiting the number of hours for riding activity), people would not be happy.

Ms. Simones commented that Mr. Philbrick does enjoy ATV riding, and this is a hobby. However, Mr. Philbrick does not live at Borkum Road, Ms. Simones and the rest of the abutters do live there. Ms. Simones assumed he could not speed that fast at other tracks as opposed to the property on Borkum Road. The activities of the ATV appear to be for a race track and high speed racers, not just ordinary simple practicing.

Through the Board, Mr. Bergman asked the following questions of Mr. Philbrick:

- Are you familiar with the list of the tracks with which Mr. Gabriel submitted to the Board? For verification, did you work with Mr. Gabriel in composing the list of the tracks?
- Have you ridden on these tracks specified on the list? In addition, how many years, number of years, you have been riding an ATV/dirt bike?
- Could describe the similarity and differences between these tracks on the list and the tracks on 51 Borkum Road?
- The list (of the tracks) submitted contains 20 – 30 addresses, is this correct?

Mr. Philbrick said he is familiar with the tracks on the list and he did assist Mr. Gabriel in creating the list. He has ridden on these tracks specified on the list, and he had started riding an ATV/dirt bike since the 1990's. Mr. Philbrick explained the tracks may not be as long as the one on 51 Borkum Road, but there are sections where you can speed up and go faster. The dirt bikes used for the riding on these tracks are the same bikes-the same make and models as were used in riding on 51 Borkum Road.

In reference to the track on the list, Mr. Bergman asked Mr. Philbrick if any of these tracks had been ordered to stop (the riding activity) by a Cease and Desist Order (CDO).

Mr. Philbrick said to his knowledge, there have not been any CDO's issued to any one of the tracks on the list.

Mr. Collette asked Mr. Philbrick whether the tracks on the list are legal, and also legal in terms of high tension, rail-trail tracks.

Mr. Philbrick replied that the tracks on the list were built on private and personal properties which legally were owned. The tracks are not high tension or rail-trail tracks.

Ms. Backus asked if the owners of these properties allowed Mr. Philbrick to use the tracks. For clarification, are the tracks gravel and sand tracks?

Mr. Philbrick said yes, he had permission from all owners to use the tracks. The tracks are not gravel/sand tracks (e.g. gravel/sand tracks on commercial properties such as Bonds Gravel and Sand Company). These are tracks which are on the personal properties for private use.

Mr. Cook commented that the above questions from Mr. Bergman and answered by Mr. Philbrick are not relevant to the hearing tonight. Mr. Cook said tonight's hearing is not about what Mr. Philbrick and his friends did – riding the ATV on the other tracks in Spencer. It is about Mr. Gabriel and his intention for the use on property at 51 Borkum Road.

Mr. Mancini asked if the properties which Mr. Philbrick has ridden on have any structures/buildings on them.

Mr. Philbrick said some properties, surrounding those properties that have the tracks, do have homes, and some are just vacant lots.

The following were additional comments from the residents of Borkum Road:

Mr. Kenneth Knowles of 7 Borkum Road: He sold the previous property due to the level of noise. He moved here because it is a calm and quiet neighborhood. The ATV activities generated so much noise; at this point of his life he cannot afford to move elsewhere.

Mr. Aaron Powell of 56 Borkum Road: The zoning district is Rural Residential (RR), low density residential uses, and the use of a track and its format shall not be considered as a rural character.

Mr. Benjamin Sanderson of 15 Borkum Road: He likes and prefers to live in a quiet neighborhood which is why he purchased the property here since 1973, and eventually built a house on the property. He does not want the ATV activities on 51 Borkum Road.

Mr. Jim St. Germain of 2.5 Buteau Road: We, the residents, are residing here and the noises from ATVs are very intrusive to our livelihoods.

Mr. Michael Grifford of 33 Borkum Road: If the Board were to grant a special permit with conditions and restrictions to Mr. Gabriel, Mr. Grifford inquired as who will monitoring the use (e.g. making sure that people have the permission to be there for riding and they are Mr. Gabriel's friends and relatives), since Mr. Gabriel lives out of town.

Mr. Gabriel's own a business "Gabriel Racing" in Worcester. Mr. Weinberg asked whether Gabriel Racing is still sponsoring the racing team, and if not, when it stopped.

Mr. Gabriel said his son is no longer racing, he had stopped racing 2 years ago.

Mr. Weinberg said currently there is information on the website referencing that Gabriel Racing is sponsoring the racing team.

Mr. Gabriel indicated his son may be sponsoring kids just to help them get going, but does not get involved or participated in the racing.

Mr. Weinberg: The information on the website thus is outdated, is that correct?

Mr. Gabriel: Yes, the information in regards to sponsoring the racing is outdated.

If Mr. Gabriel's son were to sponsor kid (s), Ms. Backus asked as to where the practicing will take place?

Mr. Gabriel said he does not know where. He then explained how the sponsoring works; his son will give some discount to purchase the merchandise in Gabriel Racing business, so when the kids go to racing they may put the name of the business (Gabriel Racing) on to their 4-wheelers, and dirt bikes.

Ms. Backus commented his son would not tell the kids whom he is sponsoring to go practice at 51 Borkum Road.

Mr. Gabriel said no, his son would not say such that.

The Board members thought a site visit is necessary. Ms. Backus made a motion to continue the hearing to Wednesday, August 3, 2011 at 7:15 p.m. Ms. Kresco seconded the motion and the vote was 4-0 in favor.

Mr. Bergman said it has appeared to be a lot of discussion about the track tonight. He would like to inform the Board and the public that Mr. Gabriel does not necessarily have the intention to keep the track if there would not have been decision that allowed some private use. Mr. Bergman believes that a resolution to this situation is in everyone's best interest.

Ms. Backus announced the site visit will be on Saturday, June 25, 2011, all members will meet with Mr. Gabriel at 9:00 a.m at 51 Borkum Road.

### **Election of the Officers:**

Mr. Collette made a motion to nominate Ms. Backus as the Chairman. Ms. Kresco seconded the motion and the vote was 4-0 in favor.

Ms. Backus made a motion to nominate Mr. Collette as the Clerk. Ms. Kresco seconded the motion and the vote was 4-0 in favor.

### **Approval of Minutes: None**

With no further discussion from the Board Ms. Backus made a motion to adjourn the meeting at 9:30 a.m. Ms. Kresco seconded the motion and the vote was 4-0 in favor.

Submitted By:

Bea Meechan  
Senior Clerk, Office of Development and Inspectional Services

### **List of Documents used on 6/22/2011**

- Commonwealth of Massachusetts Housing Court Department, Docket No. 06-CV-705, and Docket No. 07-CV-779.
- The Decision dated 12/7/2006 issued by the ZBA.
- Exhibits 1-10 prepared by Attorney Morris Bergman submitted on 6/22/2011.
- Cease and Desist Order issued by Mr. Robert Morra dated 10/3/2006.
- Two maps based on aerial photographs – Exhibit 3, prepared by Ms. Buck. [They are identical maps, one contains labels identifying the abutters' names and property addresses, the other does not].
- Aerial photograph of the site – Exhibit 4, submitted by Mr. Weinberg on 6/22/2011.
- Plan of Proposed Practice Track – Exhibit 5, prepared by Guerard Survey Co, & Associates, Inc., for ATV Realty Trust, Jonathan Gabriel Trustee, plan dated 8/4/2006.
- An article (dated 11/4/2009) – Exhibit 6, website atvriders.com referencing to Gabriel Racing, ATV Test Ride.